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UNITED STATES DEPARTMENT OF AGRICULTURE
FARM CREDIT ADMINISTRATION
WASHINGTON, D. C.

QUARTERLY SUMMARY OF CASES
RELATING TO
FARMERS' COOPERATIVE ASSOCIATIONS

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Prepared for the
COOPERATIVE RESEARCH AND SERVICE DIVISION
by the
FARM CREDIT DIVISION, OFFICE OF THE SOLICITOR
under the direction of
RAYMOND J. MISCHLER, ATTORNEY

Comments on accounting aspects of tax cases by
GEORGE J. WAAS, AGRICULTURAL ECONOMIST
COOPERATIVE RESEARCH AND SERVICE DIVISION

Summary No. 52 December 1951

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PATRONAGE REFUNDS, WHICH COOPERATIVE WAS UNDER FIXED AND LEGAL OBLIGATION TO PAY, HELD EXCLUDABLE FROM GROSS INCOME

The Tax Court of the United States reaffirmed this important principle in a decision rendered October 15, 1951, in Colony Farms Cooperative Dairy, Inc., Petitioner, v. Commissioner of Internal Revenue, Respondent (17 T.C. No. 77). Because of the importance of the decision, it is quoted in full:

"Respondent has determined deficiencies in income, excess-profits and declared value excess-profits taxes for the fiscal years ended June 30, 1943 and 1944, respectively, together with penalties, as follows:

"Year Ended	Kind of Tax	Deficiency	10% Penalty
6-30-43	Excess-profits	$6,485.57	-
6-30-44	(Income	949.26	$94.92
	(Excess-profits	1,356.63	135.66
	(Declared value (excess-profits	9.21	.92

"Petitioner pleads only one error as to the determination for each year. This is the addition to reported income of amounts in each year representing that portion of the profits of petitioner in each year upon business done by it for members, which petitioner asserts was distributed to such members as patronage dividends.

"Certain of the facts were stipulated and are so found. Other facts were established by evidence presented at the hearing.

FINDINGS OF FACT.

"The petitioner was organized and incorporated in 1933 under Chapter 48, Acts of the General Assembly of the Commonwealth of Virginia, known as the Virginia 'Cooperative Marketing Act,' and at all times material hereto it operated pursuant to the provisions of that act. Since incorporation it has conducted its business of processing and marketing milk and other dairy products on a cooperative basis within the State of Virginia, its principal office being at Denbigh, Warrick County, Virginia. Its Federal tax returns for the taxable years here involved were filed with the collector of internal revenue at Richmond, Virginia.

"Petitioner's certificate of incorporation does not provide for the issuance of stock. The provision is that 'the property rights and interests of the members in the association shall be in proportion to the amount of business done by them through the association as evidenced by the certificates of interest issued and outstanding in the name of each member, as recorded in the books of association;

provided, however, each member shall be entitled to one and only one vote.' Upon its organization the petitioner duly adopted the bylaws under which it has operated since that time. These bylaws provide that in each year any surplus earnings remaining after payment of expenses and which have accrued from business done for its members shall be determined, and that in any year in which the surplus amounts to $100 or more, the petitioner shall issue to each member a certificate of interest showing the equity of such member in surplus funds accumulated on business done for him during the prior year. Such certificates are payable to the respective members whenever, as determined by the board of directors, the revolving fund represented by the accumulation of earnings has reached proportions in excess of the corporate needs for working capital, at which time the oldest outstanding certificate shall be paid in total amount to be determined by the board of directors. The bylaws further provide that certificates of interest may also be issued, by a majority vote of the full board of directors, to members to cover payment for milk routes turned over to petitioner, including building materials, equipment, labor and other things.

"Petitioner, since its organization, has entered into similar contracts with all of its members. By this contract the member agrees to sell to petitioner the milk or cream produced by him, to be processed and sold by petitioner, the member agreeing that petitioner may retain from the proceeds of such sale the amounts necessary to meet operating and maintenance expenses or to provide reserves to be used for any proper purposes of petitioner. The member further agrees to the conditions of the articles of incorporation and the bylaws of petitioner.

"In the taxable years 1943 and 1944, petitioner purchased milk from various sources. Approximately 37 per cent of its milk was furnished to it by members in each of those years. The balance of the milk which it handled was purchased from other sources, including milk distributors in other states, petitioner being called on for much larger quantities of milk than its members ordinarily supplied, in order to satisfy the demands at nearby military and other armed-forces camps.

"In the taxable years petitioner paid to each supplier with which it dealt in the State of Virginia, whether members of the association or others, the unit price of milk set by the State Milk Commission of Virginia. When milk was purchased outside the State of Virginia, petitioner paid the regulated milk price which applied, fixed by the state or Federal government. Petitioner pooled the milk purchased, processed it and sold it at the prevailing regulated market price.

"At the end of each of the fiscal years here involved, petitioner determined the entire revenue received by it from the sale of milk and deducted therefrom the amount paid by it to members and others for the purchase of the milk, together with all other costs and

expenses. It then computed the portion of the net revenue so determined which was attributable to the sale of milk processed for members, by applying to said net revenue the percentage ratio that purchases from members bore to total milk purchases, to wit: 37.09 percent for the fiscal year 1943 and 37.86 percent for the fiscal year 1944. These calculations, together with the annual accounting statement, were prepared by an auditor employed in the Division of Markets of the Department of Agriculture and Immigration of the Commonwealth of Virginia. For the taxable fiscal year ended June 30, 1943, the portion of the net revenues attributable to purchases from members was determined to be $6,722.44, and for the fiscal year ended June 30, 1944, such portion was determined to be $4,327.96. These amounts were, at the close of these years, set up on the books of petitioner under the heading 'Reserve for Members' Equity.'

"The petitioner, in reporting its income for the taxable years here involved, excluded the aforesaid sums of $6,722.44 and $4,327.96 from gross income by deducting them from gross sales under the heading 'Less: Returns and Allowances.' In determining the deficiencies involved in this proceeding, respondent included these sums in petitioner's gross income in each year, which resulted in an increase in each year in these respective amounts in petitioner's net taxable income.

"For each of the years here involved, petitioner's board of directors adopted resolutions declaring that the earnings made on member business for the year should be distributable to the members as patronage refunds at the close of the year, based on the audit report.

"At the close of each of the taxable years petitioner executed and delivered to each of its members a so-called certificate of interest in the amount of such member's proportionate share in net earnings for the year upon the business done by petitioner with such member, the amounts of these certificates being represented in the total set-up at the close of each year on petitioner's books in the reserve entitled 'Reserve for Members' Equity.' The certificates so issued to its members by petitioner were in the following form:

Amount $__________ Certificate Number__________

CERTIFICATE OF INTEREST
of the
COLONY FARMS COOPERATIVE DAIRY, INC.

NON NEGOTIABLE

"This certifies that ____________________ has an interest in the Revolving Capital Fund of the Colony Farms Cooperative Dairy, Inc., in the sum of $__________ for moneys deducted from returns due on milk and dairy products sold the Cooperative, and loaned and advanced unto it, which sum it hereby promises, covenants

and agrees to pay the member, or his assigns, when the Board of Directors finds that the Revolving Capital Fund of the Cooperative has accumulated to ample proportions to properly finance the operations of the Cooperative, or in any event upon the dissolution of the Cooperative. The Certificates of Interest of this Cooperative shall be retired in the order in which issued.

"The Certificates of Interest issued by this Cooperative are subject and junior to all other obligations thereof.

In witness whereof, the Colony Farms Cooperative Dairy, Inc., has caused this certificate to be executed this______day of__________194__.

(Seal)

COLONY FARMS COOPERATIVE DAIRY, INC.
By ____________________________
Treasurer

"Beginning in June 1946, petitioner commenced paying or liquidating, in the order in which issued, the certificates of interest theretofore issued. In June 1946 it paid outstanding certificates for net proceeds for 1936; in June 1947 the 1937 certificates of interest were liquidated; in 1948 the 1938 certificates and in 1949 the 1939 certificates. At the hearing of this proceeding, the certificates issued covering the receipts here in question on members' business for 1943 and 1944 had not been liquidated.

"During and before the fiscal year ended June 30, 1942, petitioner operated as a tax-exempt farmers' cooperative association, within the purview of section 101, paragraph 12, of the Internal Revenue Code, as up to that time its dealings had been, except for a small amount, on behalf of members.

"In the fiscal year ended in 1943 and the years following, petitioner abandoned its tax-exempt status by reason of the increase in business done for nonmembers. Petitioner has no capital stock, its operations and the building of its plant having been financed with loans from the Baltimore Bank for Cooperatives and from members. The net proceeds of each year were retained, as hereinbefore explained, to insure adequate working capital and to repay capital loans made in connection with the launching of the enterprise.

"Notwithstanding the fact that petitioner's returns state that they are made on the basis of cash receipts and disbursements, the parties agree that the records were maintained on the accrual basis of accounting.

OPINION.

"LEECH, Judge: By reason of the large amount of business done by petitioner, a cooperative, for its nonmembers, it is not entitled

to and does not claim tax immunity. Nor is the question here one of its right to a deduction from gross income in computing net income subject to tax. Our question is its right to exclude from its gross receipts earnings upon business done for or with its members, where, under its charter, bylaws and marketing contracts with its members, such profits are segregated for return to such members in the form of patronage dividends.

"This problem is not new, and has often been before the courts. The accepted rule is that if the cooperative receives these earnings under an existing legal obligation to distribute them to its members, such earnings are not income of the cooperative and consequently are to be excluded in the computation of its gross income.

"The determinative fact in establishing this petitioner's right to the exclusion is whether, at the time of its receipt of these earnings, it was under a legal obligation to pay them over to its members as patronage dividends. A thorough analysis and discussion of the principle appears in United Cooperatives, Inc., 4 T.C. 93. It was clearly recognized in that decision that, to be entitled to the exclusion, the cooperative need not have paid the earnings in cash to its members if the agreement under its bylaws and contracts with its members permitted it to retain the cash for its use in the business and to make distribution to the members in the form of stock or other evidence of the extent of their individual participation in the fund.

"Here the petitioner was organized as a nonstock corporation under the Virginia Cooperative Marketing Act of 1922. Its charter provides that the property rights and interests of the members shall be in proportion to the amount of business done by them through the cooperative, as evidenced by certificates of interest issued and outstanding in the name of each member as recorded on the books. The bylaws adopted by petitioner include a mandatory provision that at the close of each year the profits arising from member business shall be computed and the amount thereof set aside on the books in a revolving fund, and that a certificate of interest showing the amount of the equity of each member in such fund be delivered to each member, such certificates to be payable when the revolving fund has, in the opinion of the directors, been accumulated to such proportions that certificates may be liquidated in cash without reducing the fund below the amount necessary for the operations of the association. The certificates thus issued are to be liquidated in cash, in the order of their issuance. The obligation of the petitioner to its members is again specifically evidenced by its contract with each member. The arrangement under the charter, bylaws and membership contracts was meticulously carried out by the petitioner in each year since its organization.

"Respondent, upon brief, appears to recognize the fact that petitioner, to be denied exclusion of the earnings in question

from gross receipts must have received them without a legal obligation to distribute them to its members. It is argued, however, that upon this record such distributions were only to be made within the discretion of the directors. In support of this argument only one fact is pointed out as indicating that such power was only discretionary. This is the provision in the Virginia statute under which the petitioner was incorporated, that 'the association may from time to time issue to each patron a certificate of equity evidencing the patron's interest in any fund, capital investment or other assets of the association. [Emphasis supplied.]' This argument overlooks the fact that the provision cited is in the enabling act under which the petitioner came into existence, and the section in question is permissive only. It merely allows the corporation the privilege of providing for distributions of certificates of interest within the discretion of its directors. However, the liabilities of the corporation are determined by the obligations to its members specifically assumed by it under its charter, bylaws and contracts with each member.

"On this record we have no hesitation in concluding that the petitioner, through its bylaws and by its individual contracts with members, has specifically assumed an obligation to issue to each member a certificate in the amount of his participation in the profits realized upon member business, to segregate such profits on its books, and to liquidate in cash these certificates when the financial needs of the corporation permit such action.

"It must be kept in mind that the funds represented by these certificates of interest are retained by the corporation with the consent of its members and represent an investment by each of them in the business to the same extent as if the distribution had been made in cash and the amount in each instance had been repaid by the member to the association for its use as working capital.

"That the distributions in the form of certificates of interest effected a distribution of the earnings just as effectively as though made in the form of cash, it is thought, can not be disputed. We have held such distributions to be taxable income of the individual member. Harbor Plywood Corp., 14 T.C. 158; affd., 187 F. 2d 734; George Bradshaw, 14 T.C. 162.

"It is respondent's contention that the facts in the present case are similar to those in Fountain City Cooperative Creamery Ass'n, 9 T.C. 1077; affd., 172 F. 2d 666, in which we held the taxpayer was not entitled to the exclusion. The facts in that case were that the cooperative was a stock company and the amount of the dividends upon its stock was not subject to limitation. Its directors might, in their discretion allocate all of the earnings from member business as dividends upon the stock, and consequently pay no patronage dividends. In view of this condition, the power thus held by the taxpayer's directors, we held that any action on their part in making a distribution of such earnings to the members

was purely discretionary and voluntary and not taken under a legal obligation to so act. The cited case has no application here where the petitioner has no stock and the directors are definitely obligated by its bylaws and individual contracts with its members to segregate at the end of each year on its books the earnings from member business and to issue to each member a certificate evidencing his individual share of such earnings. The absence of this condition in Fountain City Cooperative Creamery Ass'n, supra, was the reason for the conclusion reached by us in that case. The distinction between the two types of cases is illustrated in Peoples Gin Co., Inc. v. Commissioner, 118 F. 2d 72, in which the exclusion was denied, the court saying:

> This case is different from the cases relied upon by the petitioner. In those cases where the deduction was allowed the obligation to make rebates or refunds was in existence before the profits were earned.

"In the present case the obligation to segregate the earnings in a revolving fund and to distribute to the members certificates of interest therein was assumed by the petitioner prior to the receipt of these earnings and did not come about through voluntary action on the part of petitioner's directors after such receipt.

"The action of respondent in denying the exclusion is reversed. Since there were certain adjustments by respondent in computing the deficiency that are not put in issue by the petition.

Decision will be entered under Rule 50."

An interesting feature of this case is that the cooperative determined the portion of its "net revenue" which was attributable to its member business (which it was conceded approximated only 37 percent of its total business for the two tax years in question) by applying to such net revenue the percentage ratio that purchases from members bore to total milk purchases and then allocated only this portion of its net revenue to members. Whether any patronage allocations were made to nonmembers or, if not, what other disposition was made of net margins of nonmember business does not appear in the record. Of course, since the cooperative was not tax exempt it was not under any obligation to make patronage distributions to nonmembers.

(R. J. Mischler)

The Tax Court in this case added another entry to the long parade of decisions holding that patronage distributions made pursuant to a prior obligation may be excluded from the taxable income of the distributing cooperative.

In so doing, however, the Court variously refers to the funds represented in the patronage dividends (and, in turn, in the certificates of

interest) as "net revenues," "earnings," "net earnings," and "profits," terms which almost everyone regards as synonymous with income. Actually the funds could not, at any time, have had the status of income on the books of the cooperative, otherwise they would not have been finally adjudged by the Court itself as excludable from income.

If the amounts involved had ever been earned by the cooperative they would have been brought squarely under the terms of a number of unchallenged court decisions which held that an obligation to distribute or pay over one's earnings to another does not relieve the payor from income tax on the earnings, whether or not the obligation existed prior to receipt of such earnings. 1/

Cooperative lawyers, therefore, have insisted that the agreement between an association and its member-patrons prevents the formation of income in the first place, so far as the association is concerned.

The amounts in question are properly termed operating proceeds, or the remainder of sales proceeds, but with a proper recognition of the effect of the legal agreement existing between the cooperative and its members, it is not seen how the funds could have been designated as profits, earnings, or revenues.

If the patronage dividends had been paid out to the members in cash, the association would not have been challenged by the tax authorities. It would have paid no income tax thereon, but the members upon receipt of the cash would have had to consider them in their own tax returns. A rule of the Treasury Department makes the receipt of any noncash distribution (including certificates of interest, as in this case) immediately taxable to the member-patron, just as if the distribution had been made in cash. Thus, as between a cash and a noncash distribution there is no difference in the amount of tax collectible by the Government. If the Commissioner, however, had won the Colony Farms case the Government would have been able to collect two taxes, one from the association and another from the members upon their receipt of the distribution.

Some confusion perhaps could have been avoided if the certificates of interest had been shown on the association's books as such, instead of under the caption "reserve for members' equity." Most people regard any capital reserve as akin to surplus and would look upon such items as considerably different from capital shares (as the certificates of interest should be regarded).

(George J. Waas)

1/ For example, see Lucas v. Earl, 281 U.S. 111 (1930), or Saenger v. Commissioner, 69 F. 2d 631 (C.C.A. 5th 1934).

Various earlier stages in the antitrust case entitled United States v. Maryland & Virginia Milk Producers Association, Inc., et al., have been reported in prior issues of the Summary. (See Summary No. 38, p. 10; No. 43, p. 6; No. 46, p. 25; and No. 48, p. 7.)

On November 8, 1951, the United States Circuit Court of Appeals for the District of Columbia, one Judge dissenting, reversed the action taken on May 16, 1950, by the District Court of the United States for the District of Columbia finding the association and Derrick, its Secretary-Treasurer, guilty and imposing fines upon them. Although the District Court had also found two of the original seven milk distributors guilty (Summary No. 46, p. 25), such distributors after appealing paid their fines and dismissed their appeals. Accordingly, the appeals for decision were confined to the association and its secretary-treasurer.

The Court's opinion in the instant decision (presently unreported), after reviewing the history of the litigation and pertinent portions of the evidence with respect to the association's full supply contracts with the convicted distributors which embodied the use-classification plan of pricing milk, 2/ continues, as follows:

> "The evidence showed that Safeway had had a full supply-classified use contract with the Association since June 11, 1940, that Richfield had had such a contract since December 11, 1946, and that both remained in effect when the indictment was returned. There was no privity of contract between Safeway and Richfield at any time. Until March 31, 1947, when it was terminated, the Federal Marketing Order prescribed the classified use plan of pricing and so immunized Safeway, Richfield, Derrick and the Association from prosecution under the anti-trust laws for the use of that plan in connection with full supply contracts. So, when Judge Holtzoff found Safeway, Richfield and the Association guilty of conspiring to restrain trade because they employed the classified use plan in connection with full supply contracts, he necessarily based his finding upon the employment of that pricing plan during the period from March 31, 1947, when the Federal Marketing Order terminated, until March 8, 1948, the date of the indictment.

2/ The Court described this plan as follows: "Under the classified use plan, milk which is utilized by the distributors for resale in fluid form is known as Class I and is paid for at the highest of three prices. Class II is milk used for cream and cottage cheese, and Class III is that which is converted into manufactured products. At the time of the trial the prices of Classes II and III were identical. This classified use system has been employed in the industry since 1916. It was one of the features of a formal marketing agreement executed in 1940 between the Association and the distributors under the Agricultural Marketing Act, a contract to which the Secretary of Agriculture was a party."

"Derrick was also found guilty. The government points out that he signed the two contracts for the Association. That fact alone cannot sustain his conviction because the contracts were admittedly legal under the Federal Marketing Order, which was in effect when they were signed. But the government says in its brief,

> '. . . He called meetings of the distributors and presided at them, he signed letters to the distributors from the Association, and he conferred with the distributors on a wide range of matters, involving the marketing of milk in the Washington area.'

"Those activities, however, were entirely legal and did not amount to participation in a conspriacy. Derrick should have been acquitted.

"We are thus brought to a consideration of the question whether the three convicted corporations, by means of full supply contracts covering 13.8 per cent of the milk sales in the area and by means of a utilization-classification system of pricing have unlawfully created, as the government puts it, 'a rigid and artificial pricing structure in the sale of fluid milk without regard for the normal forces of competition . . ..'

"Section 3 of the Sherman Act denounces as illegal 'Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in . . . the District of Columbia.' The indictment charges a conspiracy. If there was a conspiracy at all, there were two conspiracies here, for there was no proof of agreement or concerted action between Richfield and Safeway. The proof wholly failed as to actual restraint of trade as a result of operations under either of the contracts. So, as the District Court's opinion shows, the convictions were based solely upon the contract between the Association and Richfield, and upon the contract between the Association and Safeway, which were held to be sources from which it was possible that restraint of trade might flow. No individual act of the Association, however unlawful, can justify the conviction of the three defendants under the conspiracy charge.

"Having in mind what has just been said, we proceed to discuss the rights of the Association under the law, and the anti-trust boundary beyond which it and its distributors may not lawfully go in their contractual arrangements. The Supreme Court has clearly marked the boundary:

"The Court pointed out in United States v. Borden Company, 308 U.S. 188 (1939), that § 6 of the Clayton Act authorized the formation and operation of non-profit agricultural organizations, without capital stock; and provided that the anti-trust laws shall not be construed to forbid members of such associations 'from lawfully carrying out the legitimate objects thereof.' They were not to be held illegal combinations.

"The Supreme Court also said the Capper-Volstead Act was made applicable as well to co-operatives having capital stock. The persons to whom that act applies are defined in § 1 as producers of agricultural products, 'as farmers, planters, ranchmen, dairymen, nut or fruit growers.' They are authorized to act together in 'collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce' their products. They may have 'marketing agencies in common,' and they may make 'the necessary contracts and agreements to effect such purposes.'

"After summarizing, substantially as we have done, the activities in which a co-operative may engage with immunity from anti-trust prosecution, the Supreme Court proceeded to evaluate the conspiracy indictment which was before it in the Borden case, and said (at pages 204 and 205):

> "'The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise. In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is construed by the court below, "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk permitted to be brought to Chicago," 28 F. Supp. 180-182. Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in §1 of the Capper-Volstead Act.'

"In harmony with these holdings, this court said on the first appeal of the present case: [United States v. Maryland and Va. Milk Producers Ass'n, 85 U.S. App. D. C. 180, 182, 179 F. (2d) 426, 428 (1949)]

> "' . . . "full supply contracts", however legal they may be in other circumstances . . . are illegal when made for the purpose of eliminating and suppressing competition. Complete monopoly is of course unnecessary; . . ..'

and later added (at page 182):

> "'Although the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C.A. § 291, and the Clayton Act, 38 Stat. 730, 15 U.S.C.A. § 17,

give some privileges to combinations of agricultural producers, a combination of producers and distributors to eliminate competition and fix prices at successive stages in the marketing of an agricultural product is not privileged.'

"Both the Bordon case and the first appeal of this case had to do with the sufficiency of an indictment. Neither dealt with an actual situation presented by proof. We draw from our former opinion in this case the principle that 'full supply contracts' are illegal when made for the purpose of eliminating and suppressing competition; and that a combination of producers and distributors to eliminate competition and fix prices at successive stages in the marketing of milk is also illegal.

"This record is barren of proof that the full supply contracts between the Association and the two convicted distributors were made for the purpose of eliminating and suppressing competition. The only evidence on the subject is to the effect that they were not made for that purpose and did not produce that result. We have already shown that neither wholesale nor retail prices were fixed by joint action of the alleged conspirators.

"The District Court was of the opinion [United States v. Maryland and Va. Milk Producers Ass'n, 90 F. Supp. 681, 689 (1950)]

> "'. . . that "full supply" contracts which embodied the classification plan for arriving at the price of milk constituted, in effect, agreements to fix prices. It is well settled than an agreement to fix prices of a commodity is per se an unreasonable restraint of trade and, therefore, a violation of the Sherman Act. . . .
>
> "'The conclusion is inescapable that there is substantial evidence justifying a finding that the operation of the "full supply" contracts embodying the classification plan constituted a scheme for controlling and fixing prices of milk sold by the Association to the distributors, and, therefore, is an illegal restraint of trade in contravention of Section 3 of the Sherman Act.'

"We have found no evidence at all in the record which would justify the finding to which the District Court referred. The only evidence on the subject is contrary to such a finding. But if there were substantial evidence tending to show a classified use-full supply contract is 'a scheme for controlling and fixing prices of milk sold by the Association to the distributors,' such evidence would not justify the trial court in holding the appellants guilty, unless it showed guilt beyond a reasonable doubt.

"Judge Holtzoff also concluded that, because the Agricultural Marketing Act authorizes marketing agreements and the use of the classification plan and exempts them from anti-trust laws, provided the parties submit to supervision and regulation by the Secretary of

Agriculture, it must follow that a marketing agreement which uses the classification plan is per se a violation of the Sherman Act if it is not a Federal Marketing Order under which the Secretary of Agriculture has supervisory and regulatory power. We do not agree.

"When Congress enacted the Agricultural Marketing Act, it did not devise the classification use plan as an original proposition; rather, it adopted that plan, which had been used in the industry since 1961. In the language of Judge Holtzoff, it 'is generally regarded as economically sound because of the unique and exceptionally features of the industry.' Full supply contracts embodying the classified use pricing scheme are not in themselves illegal unless they are made for the purpose of eliminating and suppressing competition or unless they tend to have that effect. A full supply contract containing the classification plan for arriving at the price of milk is, in a sense, an agreement to fix the price of milk; but only in the same sense that a sales contract for a flat price is an agreement to fix prices. For such a contract to be illegal per se it must be demonstrable that it gives to the contracting parties power which may be wielded to the disadvantage and detriment of the public and which may become oppressive as against competitors and tyrannical as against consumers.

"Had Congress intended to forbid the use of the classification pricing plan except under a Federal Marketing Order, doubtless it would have so provided. But it did not. Nor is a co-operative compelled to operate under a Federal Marketing Order. Its free assent to such an Order is required to make it effective, but the District Court's construction of the Act practically destroys that freedom.

"It should be noted also that the purpose of the Act was not to forbid the use of classification pricing, but to permit the making of marketing agreements under the Secretary's supervision which otherwise would unlawfully restrain trade. Therefore, any marketing agreement outside the Federal Order must unlawfully restrain trade if the parties to the agreement are to be held guilty of violating the Act.

"The case was well summarized by Judge Holtzoff when he wrote (90 F. Supp at 689):

> "'In justice to all, it should be observed that there is no evidence that any of the defendants acted in bad faith or that any of the defendants was actuated by any malevolent motice or pursued an evil design, or that any defendant engaged in any unethical practice, or in any manner oppressed either any competitor or the public. Moreover, there is no evidence that the prices fixed were unreasonable or that either the competitors or the consuming public were in any way actually harmed or prejudiced. There is an honest difference of opinion between the Government and some of the

defendants as to whether the course of conduct just described was permitted by law. This question could well have been settled by a civil action without criminal prosection with all its implications.'

"It follows that there is 'an honest difference of opinion' as to whether the full supply-classified use contracts 'have created a rigid and artificial pricing structure in the sale of fluid milk without regard for the normal forces of competition.'

"The testimony of expert witnesses was to the effect, not only that the classified use pricing system is economically sound, but that in practice it is responsive to competition and levels off to the same result in money as does the flat price. The term 'blend price' is sometimes applied to the flat price because it is and necessarily must be a blend or average of all the prices set under a classified use plan; but the latter has the added advantage of automatically caring for the surplus milk which develops from day to day. There was no expert evidence to the opposite effect.

"The result of all this is that the District Court used as a basis for conviction, and the government urges here as a basis for sustaining it, an economic theory about which there are two opinions supportable by plausible argument. In advancing the theory the government's brief makes statements such as these:

"'The classified-use plan, as employed by appellants, unlawfully restrains trade.

"'The classified-use plan restrains competition at the retail level.

"'The classified-use plan also tends to regulate the price relationships among the classes of milk products sold in the retail market . . . .the classified-use plan tends to establish minimum differentials between the retail prices.'

"These statements are conclusions which find no support in the evidence concerning the factual situation nor in the testimony of the experts. They are no more than statements of economic theory ably advocated by the appellee.

"But the trouble is that, as plausible as the government's economic theory is, it is not enough to sustain these convictions. It must appear beyond a reasonable doubt that these three corporations were guilty as charged, or their convictions cannot stand. In pronouncing them guilty, the court was relying on the economic hypothesis that full supply-classified use contracts tend unlawfully to fix prices and to restrain trade. There was no expert evidence to support the hypothesis and, had there been, it would not have supported a finding of guild. It is still the law that there can be no conviction of crime on circumstantial evidence unless the only possible inference to be derived from it is that of

guilt. There must be evidence which forecloses and makes impossible any other conclusion. Pennsylvania Railroad Company v. Chamberlain, 288 U.S. 333 (1933); Hammond v United States, 75 U.S. App. D. C. 397, 127 F. (2d) 752 (1942); Cady v. United States, 54 App. D.C. 10,293 Fed. 829 (1923); Isbell v. United States, 227 Fed. 788 (C.C.A. 8th 1915). It is equally true that guilt cannot be inferred from an unsupported economic theory.

"We hold that the government's theory does not show beyond peradventure that the full supply-classifed use contracts in this case gave their makers the power to do the mischief which the indictment alleges."

It is not known at the present time whether the Government will appeal this decision to the Supreme Court. In this connection, the views of Circuit Judge Fahy, in his dissenting opinion, may have a bearing. After briefly reviewing the situation before the Court, he said:

"The Association, a corporation composed of approximately fifteen hundred dairy farmers, referred to as producers, supplies approximately 80% of the milk sold in the Washington area. The combining of these producers with one another in an Association and the pooling of their milk for sale to distributors, with consequent stronger bargaining position and other advantages, is not questioned. Such agreements as are incident to this arrangement are protected from the anti-trust laws by Congressional enactment. 42 Stat. 388 (1922), 7 U.S.C. §§291, 292 (1946) (Capper-Volstead Act); 38 Stat. 731 (1914), 15 U.S.C. § 17 (1946) (Clayton Act). United States v. Borden Co., 308 U.S. 188 (1939).

"The two distributors found guilty of violating Section 3 of the Sherman Act (26 Stat. 209 (1896), 15 U.S.C. § 3 (1946) during a test period accounted for an aggregate of 13.8 per cent (one for 12.3 per cent and the other for 1.5 per cent) of Class I and Class II milk sold in the Washington area. By contract they obtained their full supply from the Association to the extent it could meet their requirements.

"The case turns upon the arrangements between the Association and these distributors, and of the latter among themselves, consisting primarily of full supply contracts which embody a use classification plan. [At the time of indictment such contracts were also in effect between the Association and distributors who, with the two convicted, accounted for about 22% of the milk and its products sold in the Washington area.] The District Court, Judge Holtzoff sitting, was of the opinion that these contracts constituted agreements for controlling and fixing prices of milk sold by the Association to the distributors, and, therefore, restrained trade and commerce in violation of Section 3 of the Sherman Act.

"This conclusion of the trial judge appears to me to be correct. As stated, the distributors are required to obtain their full

supply from the Association to the extent it is able to meet their requirements. The Association carries out this obligation by assigning the milk supply of certain member producers to certain distributors. The latter sell the milk for uses which are divided for pricing purposes into three classes. The most important of these classes consists of the use of milk for consumption in fluid form. This is Class I. Milk so used is ordinarily sold in bottles or cartons for direct consumption, though it may be sold in bulk. Milk used or sold by the distributor for conversion into cream or cottage cheese is in Class II, and that used or sold by the distributor for manufacturing products such as ice cream is in Class III. These classifications have nothing whatever to do with the quality of the milk. The classifications are entirely upon the basis of use and are for pricing purposes. For Class I milk the distributor pays the Association a higher price than is charged by the Association for Class II or Class III milk. The price charged for Class III is either less than that for Class II or is the same. Since the distributor does not know when he receives the milk from the Association how much of it he will sell or use in each class, the amount he pays the Association is computed by an audit made after disposition or use.

"There are other details of the arrangements which might aid in stabilizing the market, in keeping a steady supply to meet the essential needs of the consuming public, and at the same time in avoiding the economic distresses consequent upon a surplus. But the essential features of the arrangements are those above outlined.

"Pricing according to use is the principal feature of the use classification plan. During the relevant period this plan was in effect between the Association and distributors and among the latter. [Thus, the Richfield contract, used to illustrate, provided that in the event the Marketing Agreement and Order approved by the Secretary of Agriculture is terminated and not immediately replaced, a situation which actually arose, 'the price to be paid and settlement arrangements for milk, cream, and/or other dairy products sold and delivered hereunder shall be that price charged and arrangements in effect with all full-supply distributors buying District of Columbia or Maryland-inspected milk.'] The inevitable effect is to bring about and to maintain a price differential based on use. A higher price is paid by the distributor for milk used to fill the more vital need of the public for nutrition and health purposes (Class I). In this manner the Association and distributors engage in price fixing, although the actual prices for the several classes are fixed by the Association alone. This court so held, as I read the opinion, in United States v. Maryland & Virginia Milk Producers Ass'n, 85 U.S. App. D.C. 180, 183, 179 F. 2d 426, 429 (1949), cert. denied, 338 U.S. 831 (1949), when the case was here on appeal from dismissal of the indictment. There is concert between the Association and distributors and among the latter as a result of which the price for Class I milk is higher than the price charged for like milk used for other purposes. As the District Court held, this in effect is price fixing, and, therefore, is a combination or conspriacy in

restraint of trade in violation of Section 3 of the Sherman Act, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Real Estate Boards, 339 U.S. 485, 489 (1950), unless relieved of this consequence by approval of such arrangements under some valid law, such as the Agricultural Marketing Agreement Act of 1937 (48 Stat. 31 (1933), as amended, 50 Stat. 246 (1937), 7 U.S.C. § 601 (1946); 48 Stat. 34 (1933), as amended, 7 U.S.C. §608b (1946). See United States v. Borden Co., 308 U.S. 188 (1939); and United States v. Maryland & Virginia Milk Producers Ass'n, supra. The arrangements here involved were in fact at one time approved by the Secretary of Agriculture under the provisions of that Act. Congress recognized the need in the public interest of permitting the orderly marketing of milk through arrangements or agreements or combinations which would run counter to the policy of the anti-trust laws, provided such arrangements were subjected to public controls set forth in the statute. The Association and distributors in the Washington area brought themselves within this legislation by obtaining governmental approval of the use classification plan in 1940. In 1947, however, they voluntarily withdrew, as was their right, because of dissatisfaction with the controls, including those involving price. The conduct now in question then became subject to the standards of the Sherman Act. United States v. Borden Co., supra.

"[There is another factor bearing directly upon price. Should a distributor dealing principally with the Association purchase milk from a producer not a member of the Association, as is sometimes done, this milk, however used by the distributor, and though of equal quality to that supplied by the Association, is classified by the Association in the audit as in the lowest use class, regardless of the price paid for it by the distributor, unless there is an insufficient supply from the Association for Classes I and II. The Association is accordingly paid the higher use price (merely because some milk is obtained from a source other than the Association) though the milk supplied by the independent might have displaced Association milk for Class I use.]

"In our recent decision in Pennsylvania Water & Power Company, et al. v. Federal Power Commission, _____ U.S. App. D.C. _____, _____ F. 2d _____, decided July 3, 1951, we dealt with the power of the Commission, acting within the policy and provisions of the Federal Power Act, to require the continuance of arrangements which, without the sanction of valid public authority, would violate the anti-trust laws. So here, the conflicting public policies embodied in the Sherman Act, on the one hand, and, on the other, in the desire of Congress to aid in stabilizing the milk industry, are reconciled in the Agricultural Marketing Agreement Act; but when the Association and distributors chose to remain no longer subject to the controls therein specified, the arrangements which continued into the period covered by the indictment became exposed to the Sherman Act.

"Price fixing is illegal *per se* because its necessary effect is to restrain trade or commerce by substituting agreement upon price for competition and economic factors such as supply and demand. In the case at bar it might well be that economic reasons would cause milk consumed in fluid form to bear a higher price than like milk used for other purposes; it is shorter-lived and there may be greater expense and risk in handling it for such consumption than for conversion into cheese, for example. Nevertheless, in the absence of approval under the 1937 Act, *supra*, agreement among competing distributors and between them and their supplier to a plan which maintains such higher price is invalid. Though the actual price and the exact amount of differential between classes at any particular time are not shown to have been set by agreement or in an unlawful manner, the existence of a differential based on use, with a higher price for Class I use, is the intended and necessary consequence of the plan. Furthermore, its necessary effect is to enlarge the area within which Classes II and III may compete by lowering the cost to the distributor of this milk and shifting a larger share of the total cost to Class I. This also restricts the competitive potential of Class I, a result made more certain by the control the Association exerts over 80% of the supply in the Washington area. A higher price accordingly is attached to the milk required to meet the most important need of the public.

"In view of the foregoing it is not deemed necessary to discuss the question whether the full supply contracts, apart from the use classification plan, violate the Sherman Act. *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Fashion Guild* v. *Trade Comm'n.*, 312 U. S. 457 (1941); and *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949). See, also, *United States* v. *Maryland & Virginia Milk Producers Ass'n, supra*, at p. 182.

"The individual appellant was an active officer of the Association during the period to which the trial court limited the scope of the indictment. In addition to such inferences as might properly be drawn from the duties of his position as Secretary-Treasurer, considered in connection with the operations of the use classification plan, it is clear that this plan continued into the relevant period under contracts which, prior thereto, he had executed as Secretary-Treasurer. His authorization of such operations, therefore, did not cease with termination of the Marketing Agreement and Order in 1947. His conviction I think was accordingly justified in view of the statutory provisions that whenever a corporation shall violate any of the penal provisions of the anti-trust laws, such violation shall be deemed to be that also of the individual officers who shall have authorized or done any of the acts constituting in whole or in part such violation, which shall be deemed a misdemeanor (38 Stat. 736 (1914), 15 U.S.C. § 24 (1946)). See *United States* v. *Dotterweich*, 320 U.S. 277 (1943).

"I would affirm the judgments of the District Court."

(R. J. Mischler)

TERMINATION OF MEMBERSHIP IN MARKETING COOPERATIVE BY CEASING TO BE A PRODUCER AND ABANDONING MARKETING AGREEMENT

In Kaneko v. Jones, 235 P. 2d 768, the Supreme Court of Oregon held that where a Japanese member of a marketing cooperative was evacuated from leased premises and executed a power of attorney which designated the association to care for growing crops during 1942 but did not provide for growing or marketing crops in subsequent years, the member ceased to be a producer upon his evacuation and his failure to return after his release constituted a voluntary abandonment of his membership in the association.

Hiroshi Kaneko, plaintiff in this suit, started the action in 1948 against Jones and the Labish Celery Growers Cooperative Association. The proceeding was in the nature of a stockholder's suit for the benefit of the association "to compel defendant Jones to return to the association $30,000, which, it is alleged, was unlawfully, wrongfully and without consideration paid to Jones by the association, and further, to compel the association to make an accounting of such sum to plaintiff and other association members." The Circuit Court rendered judgment for the defendants and plaintiff appealed.

Since this was a derivative action, the basic issue was whether plaintiff had any status in relation to the association which would permit him to sue. In other words, was he a member? Excerpts from the Court's opinion on this issue follow:

> "The above association was organized as a nonprofit cooperative association under and by virtue of § 77-501 et seq., O.C.L.A. Articles of incorporation were entered into between five persons of Japanese ancestry on March 7, 1930. The main purpose of such association was to market the products of its members. The defendant Jones owned approximately 200 acres of rich celery land in what is known as the Lake Labish community near Brooks, and entered into leases with some 25 Japanese for various parcels of land. On the 4th day of December, 1937, Jones executed a lease to the plaintiff covering 8.87 acres of land for a term of ten years, the rental to be payable annually in five installments which aggregated approximately $100 per acre per year. It was stipulated in the lease that plaintiff should maintain a residence upon the premises at all times during the term of the lease.
>
> "Each of the various lessees under Jones signed a marketing agreement with the association, such marketing agreement being provided for in § 77-501, supra, and in the bylaws of the association, by which agreement the tenant agreed to sell and deliver to the association all the celery produced by the grower during the life of the agreement. The association by the agreement agreed to resell the celery and pay over to each grower all of the net proceeds of each pool in which he had celery, after deducting all necessary

expenses and two per cent for a reserve. By the terms of the above section, any grower signing a marketing agreement thereby became a member of the association.

"The United States entered the second World War in December, 1941. Shortly thereafter the various Japanese, including plaintiff, an American citizen by birth, were apprehensive of being evacuated from the premises in question, and on April 20, 1942, plaintiff and the other Japanese, with the consent of Jones, individually executed powers of attorney designating the association as their attorney to care for the growing crops on their leased farms and to sell and dispose of the products therefrom as such association deemed fit for the year 1942, paying to itself one-half of the net profit realized from the operations during said period. It was understood that such powers of attorney would not become effective unless and until the Japanese were evacuated from the premises. No provision was made for growing or disposing of crops for subsequent years, although plaintiff's lease with Jones ran until December, 1947.

"In May, 1942 the United States government evacuated said Japanese, including plaintiff, whereupon the association, through Jones, the only remaining member of the association and its manager, marketed the crops for the year 1942, and made a net profit of $172,518.34. One-half of this amount was paid over to the evacuees during the month of February, 1943, including the sum of $11,346.64 paid to plaintiff, at which time a full accounting of the association's operations under the powers of attorney was rendered. The other half remained with the association which paid one-half of the sum retained by it to the various white workers as a bonus for the work they had done in tending and harvesting the crops, Jones, however, receiving nothing for the additional work he had done in carrying out the powers of attorney.

"After the evacuation Jones acquired new tenants; new marketing agreements were entered into, and new members, as well as new officers of the association, came into being.

"From the above sum retained by the association, by resolution of the board of directors at a meeting on June 13, 1946, $30,000 was allotted to defendant Jones 'in lieu of rents' not being increased to members of the association.

"After his evacuation in 1942, plaintiff never returned to Lake Labish, nor did he fulfill the terms of the unexpired Jones' lease, although he was released by the government in August, 1945, nor did he make claim for an accounting until shortly before suit in April, 1948, albeit he had full knowledge for over five years of the amount of money which the association had retained.

* * * * * * *

"Membership in the association is predicted on the hypothesis that to become a member one must be a producer and have a marketing agreement with the association. The marketing agreement in a non-profit cooperative association organized for the purpose of handling the products of its members appears to be the heart of the association from which it receives its vitality. Provision is made for it in cooperative law, and the bylaws of the association sanction it. Without it, the association would be powerless to carry on its functions. Consequently, since by signing the marketing agreement a producer becomes a member of the association, it follows as certainly 'as the night the day,' that when a marketing agreement ceases to exist between a member of the association and the association, membership therein likewise ceases to exist. This conclusion is fortified by the language of the marketing agreement which reads, 'The termination of this agreement as above provided shall also terminate the membership relation between the grower and the association if no other marketing agreement is executed between the parties before this agreement is terminated.'

"When plaintiff executed the power of attorney to the association covering the 1942 crop year, it is clear that the parties intended a substitution of the power of attorney for the marketing agreement. The exigencies of the occasion demanded an expedient; the Japanese were about to be evacuated leaving behind a growing crop, and if they were to save anything out of the situation, it was necessary that provision be made to nurture and harvest the crop so that it could be marketed. The marketing agreement merely dealt with the disposition of the crop while the power of attorney went further and covered the growing harvesting of the crop, yielding to the grower one-half of the net proceeds instead of all the net returns as provided for in the marketing agreement. In order to take care of the emergency, a novation in effect was effectuated. Since no provision was made for growing or marketing crops for the years subsequent to 1942, no contractual relationship continued to exist between the evacuees and the association. Therefore, plaintiff's membership in the association was concluded.

"It might be urged that plaintiff did not lose his membership in the association because the board of directors did not pass a resolution of expulsion pursuant to the bylaws of the association. It is apparent from reading the bylaw in question that the expulsion referred to applies only where a member is guilty of a breach of his obligations to the association while actively engaged as a grower, but has no application to the situation which we have presented in the case at bar.

"Defendants urge that plantiff abandoned his membership in the association. The term 'cooperative' in the act under discussion obviously means the united effort of the association members in the growing and marketing of their crops. Members are entitled to no dividends other than those issuing from the crops which they produce and sell through the association. Section 77-501, supra, reads in part: 'Associations organized hereunder shall be deemed "non-

profit", inasmuch as they are not organized to make profit for themselves, as such, or for their members as such, but only for their producers.' (Italics ours).

"The word 'abandonment' in legal phraseology generally means the relinquishment of rights in real or personal property, but we can see no reason why abandonment should not also apply to the relinquishment of membership in a cooperative association as the principal involved is the same. In dealing with this matter, we must consider that the cooperative association in the instant case is not a stock company nor was it organized for profit for itself nor for its members, but only for its producers.

"When plaintiff was evacuated, he ceased to become a producer and since he became disassociated from all of the activities of the association after 1942, did not return after his release in 1945 and failed to cooperate with the association according to its spirit and purpose, we are of the further opinion that plaintiff clearly, unequivocally and decisively voluntarily relinquished and abandoned his membership in the association. See McIver v. Norman, 187 Or. 516, 205 P. 2d 137, 213 P. 2d 144, 13 A.L.R. 2d 749.

"Plaintiff submits Hood River Orchard Co. v Stone, 97 Or. 158, 191 P. 662, as authority for his recovery in the instant suit. That case is distinguishable from our case in that plaintiff there was not suing in a representative capacity, but in his own behalf, for an accounting of moneys claimed owing him under the terms of a marketing contract which had been fully executed prior to his severance of membership from the association. See Baillie v. Columbia Gold Mining Co. 86 Or. 1, 166 P. 965, 167 P. 1167; Ostlind v. Ostlind Valve, Inc., 178 Or. 161, 165 P. 2d 779."

(R. J. Mischler)

OHIO ANTITRUST ACT NOT VIOLATED BY ALLEGED ACTS OF COOPERATIVE MILK PRODUCERS' ASSOCIATION

In Superior Dairy, Inc. v Stark County Milk Producers' Ass'n (100 N.E. 2d 695), decided on June 14, 1950, by the Court of Appeals of Ohio for Stark County, it was held that a petition which alleged that defendants refused to supply milk to plaintiff unless plaintiff discontinued price discounts, but which failed to allege any binding contract imposing on defendants the duty of delivering milk to plaintiff did not state a cause of action for declaratory judgment that defendants had violated the Ohio Anti-Trust Act.

Plaintiff, a corporation engaged in the business of distributing milk, brought an action for a declaratory judgment that defendants' refusal to supply milk to the plaintiff violated the Ohio Anti-Trust Act. Defendants, a cooperative milk producers' association, its officers and members, demurred to the petition on the grounds that the petition did

not state facts constituting a cause of action. The lower court sustained the demurrer and plaintiff appealed. The Appellate Court affirmed the judgment.

The following excerpts from the court's opinion set forth the essential facts:

> "The amended petition of the plaintiff, the truth of which and the legitimate inferences deducible therefrom are admitted by the demurrer, has these vital allegations which are substantially as follows:
>
> "That plaintiff is a corporation duly organized and existing under the laws of the state of Ohio; that as such it is a distributor of milk in Stark county; that it purchases its milk from the members of the Stark County Milk Producers' Association under a contract with such association; that the members of the association produce practically all the milk sold in Stark county; and that the defendant Martin R. Moomaw is the manager of the association and the other defendants are members thereof as well as representatives of the routes allocated by the association to supply milk to the plaintiff.
>
> "The plaintiff alleges further that in August 1947 it inaugurated a a program whereby it proposed to give a discount of one and one-half cents per quart to its customers and public consumers who would purchase over 90 quarts of milk per month and a discount of two cents per quart to those who would purchase over 120 quarts per month; that the defendants, after first threatening to stop the sale and delivery of milk to the plaintiff if it did not cease using its discount plan, did in fact instruct their drivers not to deliver any milk to plaintiff on and after September 1, 1947; and that, pursuant to the instructions of the defendants, milk was withheld by the drivers of the association on September 1, 1947, and thereafter, until the plaintiff agreed that it would terminate its discount plan.
>
> * * * * * *
>
> "In the original petition there was no allegation of a contract. Upon the sustaining of a demurrer thereto an amended petition was filed in which it was simply alleged:
>
> "'That the plaintiff has purchased milk, since 1938, from such members of the Stark County Milk Producers' Association as have been designated from time to time by said association to supply milk to the plaintiff, under a contract with the defendant, The Stark County Milk Producers' Association and such designated members thereof; that the plaintiff now purchases approximately 90 per cent of its milk under said contract.'
>
> "No terms or conditions of the contract are set forth so as to show any legal obligation imposed upon any one thereunder. It is not alleged whether the contract is oral or written . . . . Furthermore,

it was admitted in open court by counsel for the plaintiff that the only contract claimed in the petition is an implied contract to pay for milk when, if and as received, at the price demanded at the time by the defendants. It is conceded that the supply could be cut off by the defendants from the plaintiff at any time, at the whim of the defendants, and no legal liability would ensue."

After disposing of the issue that the lower court did not abuse its discretion under the declaratory judgment statute by refusing to make a declaration in the case because of the uncertain character of the alleged contract to be construed, the court then concluded, after discussion, that it should pass upon the question as to whether the petition stated a cause of action. The following excerpts are taken from the court's comments on this point:

"The case of List v. Burley Tobacco Growers' Cooperative Ass'n, 114 Ohio St., 361, 151 N.E. 471, was decided in 1926. At that time Chief Justice Marshall, who wrote the opinion, and Judge Matthias, the only present day member of the court participating therein and concurring, of course, never heard of the Wagner Act and probably knew nothing of John L. Lewis. Yet at page 392 of 114 Ohio St. at page 480 of 151 N.E. of that opinion the court states: 'In the last analysis this controversy turns upon a question of public policy. The earlier anti-trust legislation is being modified and certain well-defined exemptions are being created. The earlier decisions of the courts construing those acts strictly are being modified and overturned by later decisions. Section 6 of the Clayton Act, hereinbefore referred to, is a clear indication of a different policy on the part of Congress, and the Capper-Volstead Act * * * still further confirm the congressional trend. Still other legislation is now pending before Congress, * * * which still further extends the principle of permitting co-operation in agriculture marketing. * * *'

"Section 6 of the Clayton Act, Title 15, Section 17, U.S.C.A., 38 Stats. at L., pt. 1, p. 731, contains the following pronouncement: 'The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall, be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof * * *.'

"There is no place in this pronouncement for any distinction between labor organizations and agricultural organizations.

"It is conceded that the Valentine Antitrust Act of Ohio and the Co-operative Agricultural Marketing Act of Ohio were patterned after the Sherman Anti-Trust act and the Clayton and Capper-Volstead Acts, 15 U.S.C.A. §§ 1-7, 15 note, 12 et seq., 7 U.S.C.A. §§ 291,292. It is also conceded that these acts followed a federal legislative policy.

* * * * * * *

"The alleged misconduct charged against the defendants is simply that, without any binding contract to deliver any milk to the plaintiff at any time for any price or under any conditions, but only an implied contract to pay for the milk furnished at the price demanded, defendants have informed plaintiff that they do not choose to deliver to plaintiff any milk it plaintiff cuts the retail price. Since they could at any time stop deliveries for any reason without incurring any legal obligation, it is obvious that these actions fall far short of the inhibitions judged by a 1926 standard, and certainly are remote by 1950 standards, of legislative policy. Any interpretation of these two acts which permits a labor organization to roam over an eighty acre field while confining an agriculture organization to the barn lot is neither just, desirable, or proper.

"Consequently we hold that the alleged actions of the defendants are permissible under the Co-operative Agricultural Marketing Act of Ohio and are not prohibited by the Valentine Anti-Trust Act."

(R. J. Mischler)

INFORMATION RETURNS ON PATRONAGE DIVIDENDS

The General Instructions entitled "How to Prepare your 1951 Corporation Income Tax Return on Form 1120" have recently become available from the Bureau of Internal Revenue. There appears on Page 1 thereof, under "G-(1). Information at the source", this paragraph:

"The returns on Forms 1096 and 1099 shall also include (except in the case of insurance companies taxable under Supplement G and corporations exempt under Section 101 (10) or (11)) patronage dividends, rebates, and refunds totaling $100 or more during the calendar year 1951. Include all amounts allocated as patronage dividends, rebates, and refunds, whether in cash, merchandise, capital stock, revolving fund certificates, retain certificates, certificates of indebtedness, letters of advice, or in some other manner."

This is the first official release by the Bureau of Internal Revenue prescribing the manner in which cooperatives are to make information returns of patronage refunds.

On the same subject the Bureau of Internal Revenue, under date of December 27, 1951, released S-2918 reading as follows:

"Corporations which make distributions based on patronage are required to report patronage dividends, rebates or refunds of $100.00 or more paid or credited during the calendar year 1951 to any patron, Commissioner of Internal Revenue John B. Dunlap announced today. These reports are required this year for the first time by the Revenue Act of 1951.

"Reports of each of these dividend payments must be filed with the Processing Division of the Bureau of Internal Revenue at Kansas City, Missouri, on Information Return Forms 1099 and summaries of such payments on Form 1096 on or before February 28, 1952. These forms have not been revised to reflect the new requirements of the law but may be adapted for this purpose.

"The dividends must be reported whether they are paid in cash, merchandise, or in any other manner, or if the patron is merely notified that they have been credited to his account.

"The requirement for reporting these dividends will particularly affect farmers' and producers' cooperative organizations which make distribution of earnings to members.

"Exempted from the reporting requirement are rural electrification cooperatives, and benevolent life insurance companies, mutual ditch or irrigation companies, mutual telephone companies and like organizations, or mutual insurance companies and associations (other than life or marine) which are exempt from tax under sections 101 (10) or (11) of the Internal Revenue Code."

(R. J. Mischler)

RECENT FEDERAL INCOME TAX CHANGES AFFECTING COOPERATIVES

Under this title the Cooperative Research and Service Division of the Farm Credit Administration recently issued its miscellaneous report 156, in explanation of section 314 of the Revenue Act of 1951.

Copies of this publication may be secured on request while a supply is available from the Director of Information and Extension, Farm Credit Administration, U. S. Department of Agriculture, Washington 25, D.C.